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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 149.

JOHN A. McDONALD, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

FILED OCTOBER 24, 1899.

(17,548.)

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1 In the Supreme Court of the United States, —— Term.

JOHN A. McDONALD, Plaintiff in Error,
v.
COMMONWEALTH OF MASSACHUSETTS.

Petition for Writ of Error.

To the honorable Chief Justice of the United States Supreme Court:

The petition of John A. McDonald respectfully shows that at a sitting of the superior court for the Commonwealth of Massachusetts, held at Boston, August term, A. D. 1898, — rendered a judgment against your petitioner in a certain cause wherein The Commonwealth of Massachusetts was complainant and petitioner was defendant, as will appear by reference to the records and proceedings in said cause.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error under the statutes of the United States—709, Revised Statutes.

Your petitioner claims that errors of law appear in the record of the above-entitled cause of action, and an assignment of errors is hereto annexed.

Your petitioner further claims that his constitutional rights as a citizen of the United States were infringed upon in the trial in said court, as will appear by the record and assignment of errors hereto annexed.

Your petitioner further claims that the law under which he was sentenced—Massachusetts Public Statutes of 1887, chapter 435—is unconstitutional and contrary to the United States Constitution and amendments thereof.

2 Wherefore your petitioner prays the allowance of a writ of errors, returnable to the Supreme Court of the United States, and for citation.

JOHN A. McDONALD, *Petitioner.*
FRANCIS P. MURPHY,
Attorney for Petitioner.

Copy of record and assignment of errors annexed.

3 *Assignment of Errors.*

First. The court erred in such judgment against the petitioner because the indictment charges the defendant with the commission of a crime punishable by the laws of another State and which was committed in another State, and attempts to embrace within its provisions the jurisdiction of another State, and is in conflict with the provisions of the Constitution of the United States and its amendments—that is, article 14 of its amendments. The court invaded the prisoner's constitutional rights when it assumed an extra-

territorial jurisdiction and sentenced him to twenty-five (25) years as an habitual criminal for a crime committed in New Hampshire.

That the law under which the plaintiff was sentenced was unconstitutional, inasmuch as its enactment was contrary to the provisions of article 3, section 2, United States Constitution, — holds that — all crimes except in cases of impeachment shall be held in the States where crimes are committed; and the court erred in assuming jurisdiction of a crime committed in another State, and such action was unconstitutional.

Second. That any statute allowing the Government to make bad character a part of its original case is unconstitutional and void and oppressive, because it infringes upon certain inalienable rights of persons charged with crime. Such rights are guaranteed to every defendant by the United States Constitution and its amendments, which guarantee a fair and impartial trial to persons charged with crimes.

Third. The crime of being an habitual criminal was unknown to the common law and also to the statute law prior to 1887. It is a creation of statute, and when the statute was passed allow-
4 ing joinder of offences not permissible at common law there was no such crime known as that of an habitual criminal, and consequently there is nowhere in the law, statutory or otherwise, any authority permitting the joinder of an habitual-criminal count to a count for any other felony, and the misjoinder is manifest, and the trial was therefore irregular.

Fourth. It appears by the absence from the record of any appearance of counsel, and as a matter of fact is, that the prisoner at his trial was not represented by counsel, nor were his constitutional rights explained to him by the court, and in consequence thereof said trial was unconstitutional. Article 6, Constitution of the United States. The prisoner declares upon oath, as per enclosed affidavit, that he was unrepresented by counsel at his trial; that he received no assistance from the Government in procuring counsel, and by reason of his poverty he was unable to retain counsel; that the law under which he was sentenced is unconstitutional, inasmuch as its enactment was contrary to the provisions of the amendments of the United States Constitution, article 6, guaranteeing the accused counsel in all criminal prosecutions.

Fifth. That the law and *sentence* under which the defendant was sentenced is unconstitutional, inasmuch as its enactment is contrary to a provision of article 8 of amendments, United States Constitution, in that the punishment inflicted was a cruel and unusual punishment.

Sixth. That the said sentence is unconstitutional, inasmuch as its enactment is contrary to the provision of article 4, section 2, United States Constitution, and the eighth and fourteenth amendments thereof.

5 Seventh. That the law under which the prisoner was sentenced—Public Statutes 1887, chapter 435—is unconstitutional, inasmuch as its enactment is contrary to the provision of article 1, section 9, of the United States Constitution, which declares that no *ex post facto* laws shall be enacted.

Eighth. That the law under which the prisoner was sentenced—Public Statutes 1887, chapter 435—is unconstitutional, inasmuch as its enactment is contrary to the provision of article 5 of the United States Constitution, which declares that no man shall be put in jeopardy twice for the same offence, which appears by the court taking jurisdiction of the crime committed and expiated in New Hampshire. The prisoner's sworn affidavit, annexed herewith, states that after the judge's charge upon the whole indictment, the jury returned a verdict of guilty upon the four counts, as appears by the record, but said nothing in his charge on the habitual-criminal count; that when the jury were asked by the clerk what they had to say on the habitual-criminal count, the judge arose and stated that he had forgotten to charge them upon the habitual-criminal count, and then proceeded to instruct them upon that count, and the jury again retired and returned for the second time, bringing in a verdict of guilty on the habitual-criminal count; that this whole procedure was irregular, prejudicial, and unconstitutional, and that the prisoner was unable by lack of counsel to take exceptions to these facts.

Ninth. The prisoner waives no rights which may not be stated in detail here and which may be apparent on the record, under the Constitution of the United States and amendments thereof.

JOHN A. McDONALD,
By his attorney, FRANCIS P. MURPHY,
748 *Tremont Building, Boston.*

6 *Affidavit of John A. McDonald, Petitioner, Taken at Massachusetts State Prison, Charlestown, Boston, Mass., August* 30, 1898.

I hereby solemnly swear that at my trial in superior court, August sitting, 1898, I was unrepresented by counsel, and that on account of my poverty I was unable to obtain counsel; that the judge failed to instruct the jury on the habitual criminal count, and that they brought in a verdict of guilty upon the two counts, as appears by the record; that they were again instructed (after a verdict of guilty had been rendered) on the habitual-criminal count, and, retiring again, brought in another verdict of guilty under the habitual-criminal count, and that I was unable by lack of counsel or legal knowledge to take exceptions to those facts at the proper time.

JOHN A. McDONALD.

7 UNITED STATES OF AMERICA, *ss.:*

The President of the United States to the honorable the judges of the superior court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

[Seal of the Circuit Court, Massachusetts.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court, before you or some of you, being the highest court of law or equity of the

State of Massachusetts in which a decision could be had in the suit between Commonwealth of Massachusetts, plaintiff, and John A. McDonald, defendant, in a plea of not guilty, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said John A. McDonald, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of November next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the twelfth day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
ALBERT MASON,
Chief Justice Superior Court.

8 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

And now, here, the judges of the superior court of said Commonwealth make return of this writ by annexing hereto and sending herewith, under the seal of the said superior court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John I. Manning, clerk of said superior court (for the transaction of criminal business) within and for said county of Suffolk, have hereto set my hand and the seal of said court this twelfth day of October, A. D. 1899.

Seal of the Superior Court.

JOHN I. MANNING, *Clerk.*

9 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

To the Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, to be holden at Washington, on the* first Monday of November next, pursuant to a writ of error filed in the clerk's office of the† superior court of said Commonwealth, holden for the transaction of criminal business within and for the county of Suffolk, wherein John A. McDonald is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal of the Superior Court.

Witness the Honorable Albert Mason, chief justice of the superior court of the Commonwealth of Massachusetts, this 12th day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

ALBERT MASON,
Chief Justice Superior Court.

9½ BOSTON, *October 12th*, 1899.

I accept due service of this citation.

HOSEA M. KNOWLTON,
Attorney General of Massachusetts,
By FRANKLIN T. HAMMOND,
Assistant Attorney General.

10 COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

To all persons to whom these presents shall concern, Greeting:

Know ye that among the records of our superior court for the transaction of criminal business within and for the county of Suffolk, begun and holden at Boston, on the first Monday of August, A. D. 1898, *it* is there contained the following, the entire record in the case of The Commonwealth *versus* John A. McDonald, the following being the indictment found against said McDonald by the grand jurors on the sixth day of August, A. D. 1898:

11 COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *To wit:*

At the superior court, begun and holden at the city of Boston, within and for the county of Suffolk, for the transaction of criminal business, on the first Monday of August, in the year of our Lord one

* Not exceeding 30 days from the day of signing.
† Name of court to which writ of error is directed.

thousand eight hundred and ninety-eight, the Honorable Robert R. Bishop, a justice of said court, presiding;

12 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk,

At the superior court, begun and holden at Boston, within and for the county of Suffolk, for the transaction of criminal business, on the first Monday of August, in the year of our Lord one thousand eight hundred and ninety-eight.

The jurors for the Commonwealth of Massachusetts on their oath present that John A. McDonald, otherwise called John McDonald, of Boston aforesaid, on the eighth day of July, in the year of our Lord one thousand eight hundred and ninety-eight, at Boston aforesaid, did falsely make, alter, forge, and counterfeit a certain check and order for money; which said check and order was of the tenor following—that is to say:

"$25.00. BOSTON, *July* 8, 1898.

The Winthrop national bank, Ames building, Court St.,

Pay to the order of John McDonald twenty-five *dollars* $\frac{00}{100}$ dollars.
No. 5. GEORGE W. BIGLOW."

with intent thereby then and there to injure and defraud, against the peace of said Commonwealth and contrary to the form of the statute in such case made and provided.

13 And the jurors aforesaid for the Commonwealth of Massachusetts on their oath aforesaid do further present that John A. McDonald, otherwise called John McDonald, of Boston aforesaid, on the eighth day of July, in the year of our Lord one thousand eight hundred and ninety-eight, at Boston aforesaid, did utter and publish as true a certain false, forged, altered, and counterfeit check and order for money; which said check and order was of the tenor following—that is to say:

"$25.00. BOSTON, *July* 8, 1898.

The Winthrop national bank, Ames building, Court St.,

Pay to the order of John McDonald twenty-five *dollars* $\frac{}{100}$ dollars.
No. 5. GEORGE W. BIGLOW."

he, the said McDonald, then and there well knowing the said check and order to be false, forged, altered, and counterfeit, as aforesaid, with intent thereby then and there to injure and defraud, against the peace of said Commonwealth and contrary to the form of the statute in such case made and provided.

14 And the jurors aforesaid for the Commonwealth of Massachusetts on their oath aforesaid do further present that John A. McDonald, otherwise called John McDonald, of Boston aforesaid, on the ninth day of July, in the year of our Lord one thousand eight hundred and ninety-eight, at Boston aforesaid, did

falsely make, alter, forge, and counterfeit a certain check and order for money; which said check and order was of the tenor following—that is to say:

[United States postage, I. R., 2 two cents 2.]

"BOSTON, *July* 9, 1898.

Union Loan & Trust Company, 95 Milk street,

Pay to the order of John McDonald $25.00, twenty-five *dollars* — dollars.

No. 8. GEORGE W. COLBY."

with intent thereby then and there to injure and defraud, against the peace of said Commonwealth and contrary to the form of the statute in such case made and provided.

15 And the jurors aforesaid for the Commonwealth of Massachusetts on their oath aforesaid do further present that John A. McDonald, otherwise call John McDonald, of Boston aforesaid, on the ninth day of July, in the year of our Lord one thousand eight hundred and ninety-eight, at Boston aforesaid, did utter and publish as true a certain false, forged, altered, and counterfeit check and order for money; which said check and order was of the tenor following—that is to say:

[United States postage, I. R., 2 two cents 2.]

"BOSTON, *July* 9, 1898.

Union Loan & Trust Company, 95 Milk street,

Pay to the order of John McDonald $25.00, twenty-five *dollars* — dollars.

No. 8. GEORGE W. COLBY."

he, the said McDonald, then and there well knowing the said check and order to be false, forged, altered, and counterfeit, as aforesaid, with intent thereby then and there to injure and defraud, against the peace of said Commonwealth and contrary to the form of the statute in such case made and provided.

16 And the jurors, aforesaid, for the Commonwealth of Massachusetts, on their oath aforesaid, do further present, that said John A. McDonald, otherwise called John McDonald, has been, before the commission of the felonies hereinbefore charged, twice convicted of crime, sentenced, and committed to prison, once in this Commonwealth and once in the State of New Hampshire, for terms of imprisonment of not less than three years each—that is to say, said McDonald was once convicted at a term of the superior court of this Commonwealth duly begun and holden at Boston, aforesaid, for the transaction of criminal business on the first Monday of April, in the year of our Lord eighteen hundred and ninety, of the crime of perjury upon an indictment therefor, and on the sixteenth day of said April said McDonald was duly sentenced upon said conviction by said court to imprisonment in the State prison in this Com-

monwealth for the term of three years, and in pursuance of said sentence said McDonald was, on the seventeenth day of said April, duly committed to said State prison; and again, said McDonald was convicted at a term of the supreme court holden at Manchester, within and for the county of Hillsborough, in the State of New Hampshire, on the first Tuesday of January, in the year of our Lord eighteen hundred and ninety-four, of the crime of obtaining property by means of false pretenses with intent to defraud, upon an indictment therefor; and thereupon said McDonald was duly sentenced upon said last-named conviction, by said court last named, to imprisonment in the State prison in said State of New Hampshire for the term of four years, and in pursuance of said sentence last mentioned said McDonald was, on the twelfth day of February, in the year last mentioned, duly committed to the State prison last above mentioned.

A true bill.

JAMES B. GORDON,
Foreman of the Grand Jury.

M. J. SUGHRUE,
1*st Ass't District Attorney.*

17 To said indictment said McDonald, after being set at the bar in said superior court on said sixth day of August and having said indictment read to him, *he* said thereof that he was not guilty.

On the ninth day of said August said McDonald was set at the bar and for trial put himself upon the country, and the Commonwealth did the like, by its attorney, Michael J. Sughrue, Esquire.

A jury was empanelled and sworn to try the issue, to wit, Daniel J. Murphy, foreman, and eleven of his fellows, namely, Peter Dwyer, the younger of that name; John D. Cushing, George H. Chase, Charles H. Foss, John H. Lally, Louis Shultz, Edward B. Burlingame, Jesse M. Stone, James A. Miller, Randolph V. King, and Joshua Lovett, who, after hearing and understanding all matters and things concerning the same, returned their verdict, and on oath said that said McDonald was guilty of the whole of said indictment.

Thereupon the said McDonald was deemed to be an habitual criminal.

It was therefore considered by the court that said McDonald for his offences as set forth in said indictment be punished by confinement in the State prison in Boston, in our county of Suffolk, for the term of twenty-five years, the first day of which is to be in solitary imprisonment and the residue thereof at hard labor, and that he stand committed until he be removed in pursuance of said sentence.

On the ninth day of August, A. D. 1898, said McDonald was committed to said State prison, as appears by the following warrant, with the officers' return of commitment thereon:

18 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *To wit:*

To the sheriff of said county of Suffolk, his deputies, the officers of the court hereinafter named, and the warden of the State prison in Boston, in said county of Suffolk, Greeting: [L. S.]

Whereas, by the consideration of the superior court for the transaction of criminal business, holden at Boston within and for the county of Suffolk, on the ninth day of August, in the year of our Lord one thousand eight hundred and ninety-eight, John A. McDonald, otherwise called John McDonald, now in custody of the sheriff of said county of Suffolk, convict of the crimes of forgery of checks and orders for money, and uttering the same with intent to defraud, committed at said Boston, and said McDonald is deemed to be an habitual criminal, and was sentenced to be confined in said State prison for a term of twenty-five years, the first — day- of said term to be in solitary imprisonment and the residue thereof to be at hard labor and to stand committed in pursuance of said sentence.

We, therefore, command you, the said sheriff, deputies, and officers of said court, to remove the said McDonald from the jail in Boston, in the said county of Suffolk, to said State prison in Boston, in the said county of Suffolk; and we command you, the warden of said State prison, to receive the said McDonald, and immediately thereon to cause the said McDonald to be confined therein, for a term of twenty-five years, the first — day- of said term to be in solitary imprisonment and the residue thereof to be at hard labor; And for so doing this shall be your warrant; and you said sheriffs and officers are to make return of this warrant with your doings thereon, to the office of the clerk of said superior court in Boston, as soon as may be.

Witness Albert Mason, Esquire, chief justice of said superior court, at Boston, this ninth day of August, in the year of our Lord one thousand eight hundred and ninety-eight, and sealed with the seal of said court.

[Seal of the Superior Court.]

JOHN P. MANNING,
Clerk of said Superior Court.

9 SUFFOLK, *To wit:*

CITY OF BOSTON, *August 9th*, 1898.

In obedience to the within warrant, I have conveyed the within-named John A. McDonald, alias —— ——, to the State prison in Boston, in the county of Suffolk, and delivered him to the warden thereof, with a copy of this warrant.

Fees.

Service..... $
Copy.....
Travel.....

Expenses.

Conveyance in Boston.....

$

WM. G. TYLER,
Deputy Sheriff of said County of Suffolk.

[Endorsed:] No. 1736. State prison. Warrant *vs.* John A. McDonald, alias —— ——. Hard labor, 25 years. Solitary —, first — day-. Deemed an habitual criminal Aug. 9, 1898.

20 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our superior court to be hereunto affixed.

Seal of the Superior Court.

Witness Albert Mason, Esquire, chief justice of our said superior court, at Boston, this twelfth day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

JOHN P. MANNING, *Clerk.*

21 COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

Superior Court for the Transaction of Criminal Business.

BOSTON, *October* 12, 1899.

I, John P. Manning, clerk of said superior court, do hereby certify that the foregoing are true copies of the records of said superior court in case of Commonwealth *vs.* John A. McDonald.

I. The indictment.

II. Record and judgment of said court in said case.

III. Warrant of commitment to prison.

IV. And all the proceedings in said case, with all things concerning the same.

Seal of the Superior Court.

In testimony whereof I hereunto set my hand and affix the seal of said superior court, at Boston aforesaid, this twelfth day of October, A. D. 1899.

JOHN P. MANNING, *Clerk.*

22 On the thirtieth day of August, A. D. 1898, said McDonald, by his attorney, filed a petition for a writ of error in the supreme judicial court of said Commonwealth of Massachusetts; which petition, with the assignments of error, writ of error, writ of *scire facias ad aud. err.*, plea of the Commonwealth, facts agreed upon by parties, rescript, motion for judgment, judgment, are as follows:

23 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court, Suffolk County. Common Law.

JOHN A. MCDONALD, Plaintiff in Error,
v.
THE COMMONWEALTH.

Petition for Writ of Error.

Respectfully represents your petitioner, John A. McDonald, that at a sitting of the superior court held at Boston for the transaction of criminal business, August term, in the year of our Lord 1898, he was indicted for the crimes of forgery and also with being an habitual criminal; that in the trial of the above charges he was convicted of the whole indictment, and then and there sentenced to the Massachusetts State prison, Charlestown, Mass., for a term of twenty-five years, one day solitary confinement. Your petitioner complains that errors of law appear in the record in the above-entitled cause of action, and respectfully petitions to the supreme judicial court that you will issue a citation to the Commonwealth of Massachusetts on said writ of error, returnable the first Monday of October, A. D. 1898, and herewith files his assignment of errors as follows:

First. The court erred in such judgment against the petitioner, because the indictment charges the defendant with the commission of a crime punishable by the laws of another State, and which was committed in another State, and attempts to embrace within its provisions the jurisdiction of another State, and is in conflict with the provisions of the Constitution of the United States and its amendments, that is, article 14 of its amendments. The court invaded the prisoner's constitutional rights when it assumed an extra-territorial jurisdiction and sentenced him to twenty-five (25) years as an habitual criminal for a crime committed in New Hampshire.

That the law under which the plaintiff was sentenced was unconstitutional, inasmuch as its enactment was contrary to the provisions of article 3, section 2, United States Constitution—holds that —all crimes except in cases of impeachment shall be held in the States where crimes are committed, and the court erred in assuming jurisdiction of a crime committed in another State, and such action was unconstitutional.

24 Second. That any statute allowing the Government to make bad character a part of its original case is unconstitutional and void and oppressive, because it infringes upon certain inalienable rights of persons charged with crime. Such rights are guaranteed to every defendant by the United States Constitution and its amendments, and the constitution and bill of rights of the State of Massachusetts, which guarantee a fair and impartial trial to persons charged with crimes.

Third. The crime of being an habitual criminal was unknown to the common law, and also to the statute law prior to 1887; it is a creation of statute, and when the statute was passed allowing joinder of offenses not permissible at common law there was no such crime

known as that of an habitual criminal, and consequently there is nowhere in the law, statutory or otherwise, any authority permitting the joinder of an habitual criminal count to a count for any other felony, and the misjoinder is manifest, and the trial was therefore irregular.

Fourth. It appears, and as a matter of fact is, that the prisoner at his trial was not represented by counsel, nor were his constitutional rights explained to him by the court, and in consequence thereof said trial was unconstitutional, and contrary to article 12, constitution of Massachusetts, and article 6, Constitution of the United States. The prisoner declares upon oath, as per enclosed affidavit, that he was unrepresented by counsel at his trial, that he received no assistance from the Government in procuring counsel, and by reason of his poverty he was unable to retain counsel; that the law under which he was sentenced is unconstitutional, inasmuch as its enactment was contrary to the provisions of the amendments of the United States Constitution, article 6, guaranteeing the accused counsel in all criminal prosecutions; and that it is also contrary to article 12, constitution of Massachusetts.

Fifth. That the law and sentence under which the defendant was sentenced is unconstitutional, inasmuch as its enactment is contrary to a provision of article 5 of amendments, United States Constitution, in that the punishment inflicted was a cruel and unusual punishment, and said law and sentence is contrary to article 26, constitution of Massachusetts.

Sixth. That the said sentence is unconstitutional, inasmuch as its enactment is contrary to the provision of article 4, section 2, United States Constitution, which gives to every citizen the equal protection of the laws, and therefore the State, by assuming jurisdiction of a foreign crime, did not give the defendant equal protection of the laws.

Seventh. That the law under which the prisoner was sentenced, Pub. Sts. 1887, c. 435, is unconstitutional, inasmuch as its enactment is contrary to the provision of article 1, section 9, of the United States Constitution, and article 24, Massachusetts constitution and bill of rights, which declare that no *ex post facto* laws shall be enacted.

Eighth. That the law under which the prisoner was sentenced, Pub. Sts. 1887, c. 435, is unconstitutional, inasmuch as its enactment is contrary to the provision of article 5 of the United States Constitution, and amendments thereto, and article 12, constitution of Massachusetts, which (U. S. C.) declares that no man shall be put in jeopardy twice for the same offence, which appears by the court taking jurisdiction of the crime committed and expiated in New Hampshire. The prisoner's sworn affidavit, annexed herewith, states that, after the judge's charge upon the whole indictment, the jury returned a verdict of guilty upon the two counts, as appears by the record, but said nothing in his charge on the habitual-criminal count. That when the jury were asked by the clerk what they had to say on the habitual-criminal count, the judge arose and stated that he had forgotten to charge them upon the

habitual-criminal count, and then proceeded to instruct them upon that count, and the jury again retired and returned for the second time, bringing in a verdict of guilty on the habitual-criminal count. That this whole procedure was irregular, prejudicial, and unconstitutional, and that the prisoner was unable by lack of counsel to take exceptions to these facts.

There was no stenographic report taken of the trial.

Ninth. The prisoner waives no rights which may not be stated in detail here, and which may be apparent on the record, either under the Constitution of the United States and amendments thereof, or under the Massachusetts constitution and bill of rights.

The petitioner is aware of the decisions concerning this law, but desires to have his rights preserved as a citizen of the United States, so that in case of an adverse decision by this honorable court he may have the right of removal of his cause to the United States Supreme Court.

JOHN A. McDONALD,
By his attorney, FRANCIS P. MURPHY,
748 *Tremont Building, Boston.*

Attested copy of record annexed.

Affidavit of John A. McDonald, Petitioner, Taken at Massachusetts State Prison, Charlestown, Boston, Mass., August 30, 1898.

I hereby solemnly swear that at my trial in superior court, August sitting, 1898, I was unrepresented by counsel, and that on account of my poverty I was unable to obtain counsel. That the judge failed to instruct the jury on the habitual-criminal count, and that they brought in a verdict of guilty upon the two counts, as appears by the record. That they were again instructed (after a verdict of guilty had been rendered) on the habitual-criminal count, and, retiring again, brought in another verdict of guilty under the habitual-criminal count. And that I was unable by lack of counsel or legal knowledge to take exceptions to those facts at the proper time.

JOHN A. McDONALD.

26 SUFFOLK, *ss:*

Subscribed to and sworn to, this 30th day of August, 1898, before me—

FRANCIS P. MURPHY,
[NOTARIAL SEAL.] *Notary Public.*

Filed August 30, 1898.

Writs of error and *scire facias* issued same day, returnable first Monday of October.

Return of Chief Justice of Superior Court.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

Pursuant to the precept of this writ to me directed, I herewith send the record and process within mentioned, with all things touching the same, all which are hereto annexed, to the honorable the justices of the supreme judicial court within named.

In testimony whereof, I hereunto put my hand and seal this 6th day of September, A. D. 1898.

ALBERT MASON,
Chief Justice of the Superior Court.

Record from Superior Court.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *To wit:*

At the superior court begun and holden at the city of Boston within and for the county of Suffolk for the transaction of criminal business, on the first Monday of August in the year of our Lord one thousand eight hundred and ninety-eight, the Honorable Robert R. Bishop, a justice of said court, presiding:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

At the superior court begun and holden at Boston within and for the county of Suffolk for the transaction of criminal business, on the first Monday of August in the year of our Lord one thousand eight hundred and ninety-eight:

The jurors for the Commonwealth of Massachusetts on their oath present, that John A. McDonald, otherwise called John Mc-
27 Donald, of Boston aforesaid, on the eighth day of July in the year of our Lord one thousand eight hundred and ninety-eight, at Boston aforesaid, did falsely make, alter, forge, and counterfeit a certain check and order for money, which said check and order was of the tenor following; that is to say—

"$25.00. BOSTON, *July* 8, 1898.

The Winthrop national bank, Ames building, Court St.,

Pay to the order of John McDonald twenty-five $\frac{00}{100}$ dollars.
No. 5. GEORGE W. BIGLOW."

with intent thereby then and there to injure and defraud: against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for the Commonwealth of Massachusetts on their oath aforesaid, do further present, that John A. McDonald, otherwise called John McDonald, of Boston aforesaid, on the eighth

day of July, in the year of our Lord one thousand eight hundred and ninety-eight, at Boston aforesaid, did utter and publish as true a certain false, forged, altered, and counterfeit check and order for money, which said check and order was of the tenor following; that is to say—

"25.00. BOSTON, *July* 8, 1898.

The Winthrop national bank, Ames building, Court St.,

Pay to the order of John McDonald twenty-five $\frac{00}{100}$ dollars.
No. 5. GEORGE W. BIGLOW."

he, the said McDonald, then and there well knowing the said check and order to be false, forged, altered, and counterfeit, as aforesaid, with intent thereby then and there to injure and defraud: against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for the Commonwealth of Massachusetts, on their oath aforesaid, do further present, that John A. McDonald, otherwise called John McDonald, of Boston aforesaid, on the ninth day of July, in the year of our Lord one thousand eight hundred and ninety-eight, at Boston aforesaid, did falsely make, alter, forge, and counterfeit a certain check and order for money, which said check and order was of the tenor following; that is to say—

28 "BOSTON, *July* 9, 1898.

Union Loan & Trust Company, 95 Milk street,

[U. S. int. rev. stamp, 2 cts.]

Pay to the order of John McDonald $25.00 twenty-five dollars.
No. 8. GEORGE W. COLBY"

with intent thereby then and there to injure and defraud: against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for the Commonwealth of Massachusetts, on their oath aforesaid, do further present, that John A. McDonald, otherwise called John McDonald, of Boston aforesaid, on the ninth day of July in the year of our Lord one thousand eight hundred and ninety-eight, at Boston aforesaid, did utter and publish as true a certain false, forged, altered, and counterfeit check and order for money, which said check and order was of the tenor following; that is to say,—

"BOSTON, *July* 9, 1898.

Union Loan & Trust Company, 95 Milk street,

[U. S. int. rev. stamp, 2 cts.]

Pay to the order of John McDonald $25.00 twenty-five dollars.
No. 8. GEORGE W. COLBY."

he, the said McDonald, then and there well knowing the said check and order to be false, forged, altered, and counterfeit as aforesaid,

with intent thereby then and there to injure and defraud: against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for the Commonwealth of Massachusetts on their oath aforesaid, do further present, that said John A. Mc Donald, otherwise called John McDonald, has been, before the commission of the felonies hereinbefore charged, twice convicted of crime sentenced and committed to prison, once in this Commonwealth and once in the State of New Hampshire, for terms of imprisonment of not less than three years each; that is to say, said McDonald was once convicted at a term of the superior court of this Commonwealth duly begun and holden at Boston aforesaid for the transaction of criminal business, on the first Monday of April in the year of our Lord eighteen hundred and ninety, of the crime of perjury, upon an indictment therefor; and on the sixteenth day of said April said McDonald was duly sentenced upon said conviction by said court to imprisonment in the State prison in this Commonwealth for the term of three years; and in pursuance of said sentence said Mc Donald was, on the seventeenth day of said April, duly com-
29 mitted to said State prison; and again, said McDonald was convicted at a term of the supreme court holden at Manchester within and for the county of Hillsborough in the State of New Hampshire, on the first Tuesday of January in the year of our Lord eighteen hundred and ninety-four, of the crime of obtaining property by means of false pretences with intent to defraud, upon an indictment therefor; and thereupon said McDonald was duly sentenced upon said last-named conviction by said court last named to imprisonment in the State prison in said State of New Hampshire for the term of four years; and in pursuance of said sentence last mentioned said McDonald was, on the twelfth day of February in the year last mentioned, duly committed to the State prison last above mentioned.

A true bill.

JAMES B. GORDON,
Foreman of the Grand Jury.

M. J. SUGHRUE,
1st Ass't District Attorney.

Record.

This indictment is found and returned into said superior court by the grand jurors on the sixth day of August, A. D. 1898, and on said day the said McDonald is set at the bar; and having said indictment read to him, he says thereof that he is not guilty.

On the ninth day of said August, the said McDonald is set at the bar, and for trial puts himself upon the country, and the Commonwealth does the like by its attorney, Michael J. Sughrue, Esquire.

A jury is empanelled and sworn to try the issue, to wit, Daniel J. Murphy, foreman, and eleven of his fellows, namely, Peter Dwyer the younger of that name, John D. Cushing, George H. Chase, Charles H. Foss, John H. Lally, Louis Shultz, Edward B. Burlin

game, Jesse M. Stone, James A. Miller, Randolph V. King, and Joshua Lovett, who, after hearing and understanding all matters and things concerning the same, return their verdict, and on oath say that the said McDonald is guilty of the whole of said indictment.

Thereupon the said McDonald is deemed to be an habitual criminal.

It is therefore considered by the court that the said McDonald, for his offences as set forth in said indictment, be punished by confinement in the State prison in Boston in our county of Suffolk for the term of twenty-five years, the first day of which is to be in solitary imprisonment, and the residue thereof at hard labor, and that he stand committed until he be removed in pursuance of said sentence.

All of which appears of record in said superior court at the August sitting A. D. 1898.

In testimony whereof, I hereunto set my hand and affix the seal of said superior court at Boston aforesaid, this twenty-fourth day of August in the year of our Lord one thousand eight hundred and ninety-eight.

JULIAN SERIACK,
Assistant Clerk.

[SEAL.]

30 *Plea of the Commonwealth.*

And now comes the attorney general in behalf of the Commonwealth, and says that, by reason of any matters of fact for error assigned in the fourth assignment of errors contained in the *scire facias* in the above-entitled case, the judgment aforesaid ought not to be revoked, annulled, or held for nothing; because he says that at the time of the trial of the said McDonald, plaintiff in error, to wit, at the August sitting of the superior court held at Boston in the county of Suffolk for the transaction of criminal business, in the year of our Lord one thousand eight hundred and ninety-eight, and at the time of giving the judgment aforesaid, the constitutional rights of the said McDonald were fully explained to him; and of this it, the said Commonwealth, puts itself upon the country.

And the attorney general in behalf of the Commonwealth further says that, by reason of any matter of fact for error assigned in the eighth assignment of errors as aforesaid, the judgment aforesaid ought not to be revoked, annulled, or held for nothing; because he denies that at the time of said trial, after the judge's charge upon the whole indictment, the jury returned a verdict of guilty upon the two counts; but that nothing was said in his charge on the habitual-criminal count; that when the jury were asked by the clerk what they had to say on the habitual-criminal count the judge arose and stated that he had forgotten to charge them upon the habitual-criminal count; that he then proceeded to instruct them upon that count; and that the jury again retired and returned for the second time, bringing in a verdict of guilty on the habitual-criminal count, all in manner and form as the said Mc-

Donald has above alleged; and he says that the proceedings at said trial were in all respects regular and according to law, and of this it, the said Commonwealth, puts itself upon the country.

And the attorney general in behalf of the Commonwealth further says that as to all assignments of errors in law contained in said assignment of errors there is not any error in the record and proceedings aforesaid, or in giving the judgment aforesaid; and he prays that the court here may proceed to examine as well the record and proceedings aforesaid as the matter aforesaid assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed.

FRANKLIN T. HAMMOND,
Assistant Attorney General, for the Commonwealth.

Filed October 13, 1898.

31 *Facts Agreed — by the Parties.*

It is agreed that the following facts, if material and competent in this proceeding, may be taken as true; but the Commonwealth, by agreeing hereto, does not waive, but expressly reserves, its right to object that none of the facts hereby agreed — are material or competent in this proceeding, or such as to furnish ground, on a writ of error, for the reversal or correction of the judgment to which these proceedings relate:

1. At the trial of the plaintiff in error in the superior court on August 9, 1898, when the plaintiff in error was set at the bar for trial, and as the jury was about to be called and impanelled, the clerk made the following announcement to him:

"John A. Macdonald, you are now set at the bar to be tried, and these good men whom I shall call are to pass between the Commonwealth and you on your trial, and you have a right to challenge any two of their number without assigning a reason therefor. If you do so or object to any of them for cause, you must do it as they are called and before they are sworn."

The trial then proceeding, after each witness for the Government had given his evidence and before he had left the stand, the plaintiff in error was informed by the court of his right to ask the witness any questions he desired. After the Government had rested its case, the plaintiff in error was informed by the court that he might produce any evidence he desired in his own behalf, or that he might testify in his own behalf, but that his refusal to testify would not be taken as evidence against him. After the evidence was all in, the plaintiff in error was informed of his right to address the jury in his own defence.

2. After the judge had charged the jury, and it had retired, the jurors came into court to return a verdict, and the following question was put by the clerk: "What say you, Mr. Foreman, upon the first count of the indictment? Is the prisoner guilty or not guilty?" The foreman responded and said, "Guilty." The clerk then inquired in the same manner as to the second, third, and fourth

counts, and the foreman said "Guilty" upon each count. When the clerk was about to inquire as to the habitual-criminal charge, the judge interrupted and said to the jury that he had forgotten to charge them as to that part of the indictment, and thereupon proceeded to do so. The jury then retired again to deliberate, subsequently returned to court, and were inquired of by the clerk as to that part of the indictment containing the habitual-criminal charge, and the jury said that the plaintiff in error was guilty of that
32 part of the indictment. No objections to the above proceedings were made at the trial by the plaintiff in error, and no exceptions were taken.

COMMONWEALTH OF MASSACHUSETTS,
By F. T. HAMMOND, *Assistant Attorney General.*
JOHN A. McDONALD, *Plaintiff in Error,*
By FRANCIS P. MURPHY, *Attorney.*

Filed October 31, 1898.

[Endorsed:] No. —. John A. McDonald, pl'ff in error, *v.* The Commonwealth. Petition for writ of error, &c. Suffolk county.

33 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

[SEAL.] To our trusty and well-beloved Albert Mason, Esquire, chief justice of our superior court, Greeting:

Because in the record and proceedings and also in the rendition of judgment between us, The Commonwealth of Massachusetts and John A. McDonald, in an indictment that was prosecuted in our superior court, held at Boston, within and for the county of Suffolk, at the August sitting thereof, in the year of our Lord one thousand eight hundred and ninety-eight, manifest error hath happened, as it is said, to the great damage of the said John A. McDonald, as by his complaint we are informed, we, willing that the error, if any hath been, should be duly amended and full and speedy justice done therein to the said parties, do command you that, if the judgment be therein rendered, you distinctly and openly send us the record and process of the suit aforesaid, with all things touching them, under your seal, together with this writ, so that we may have them before our justices of our supreme judicial court, to be held at Boston, within and for the county of Suffolk, on the first Monday of October next, that, inspecting the record and process aforesaid, we may, for correcting that error therein, further cause to be done what of right and according to law shall be — to be done.

Witness Walbridge A. Field, Esquire, at Boston, this thirteenth day of August, in the year of our Lord one thousand eight hundred and ninety-eight.

C. H. COOPER, *Ass't Clerk.*

[Endorsed:] No. 6316. Writ of error.

34 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

To the sheriffs of our several counties or their deputies, Greeting:

Whereas in the record and proceedings and also in the rendition of judgment in a certain indictment which was prosecuted in the superior court, holden at Boston, within and for the county of Suffolk, at the August sitting thereof, in the year of our Lord one thousand eight hundred and ninety-eight, by The Commonwealth against John A. McDonald, manifest error, as it is said, hath happaned, to the great damage of the said John A. McDonald, as from the complaint of the said John A. McDonald we have been informed, which record and proceedings and judgment thereon are by our writ of error ordered to be removed into our supreme judicial court, to be holden at Boston, within and for the county of Suffolk, on the first Monday of October next; and whereas the said John A. McDonald, by his attorney, has assigned errors and filed the same, which now remain in the clerk's office of our supreme judicial court, a true copy of which is hereto annexed, said to have happened in the said proceedings and judgment:

We therefore command you, willing that justice should be done in the premises, that you make known unto the said Commonwealth that it appear (if it sees cause) before our supreme judicial court, to be holden as aforesaid, to hear the errors aforesaid and to show cause (if any it has) why the said errors (if any) should not be corrected as to justice appertains.

Hereof fail not, and have you there this writ with your doings therein.

Witness Walbridge A. Field, Esquire, at Boston, this thirtieth day of August, in the year of our Lord one thousand eight hundred and ninety-eight.

C. H. COOPER, *Ass't Clerk.*

[Endorsed:] No. 6316. *Scire facias ad aud. err.*

35 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, May, 1899.

In the case of John A. McDonald, pl'ff in error, *vs.* Commonwealth, pending in the supreme judicial court for the county of Suffolk—

Ordered that the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

Judgment affirmed.

By the court:

HENRY A. CLAPP, *Clerk.*

May 18, 1899.

[Endorsed:] 6316. No. 1291. Supreme judicial court for the Commonwealth. Rescript, Suffolk county. John A. McDonald, pl'ff in error, *vs.* Commonwealth.

36 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss*:

Supreme Judicial Court.

JOHN A. MCDONALD
v.
COMMONWEALTH OF MASSACHUSETTS.

Motion.

And now comes the defendant and moves that the judgment in the above-entitled case may be affirmed in accordance with the rescript sent down May 18, A. D. 1899.

By F. T. HAMMOND,
Assistant Attorney General.

Filed June 6, 1899.

37 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court.

JOHN A. MCDONALD, Plaintiff in Error,
v.
THE COMMONWEALTH OF MASSACHUSETTS.

It is therefore considered by the court, after rescript received from the supreme judicial court for the Commonwealth and in accordance therewith, on this ninth day of October, A. D. 1899, that the judgment aforesaid be, and the same is hereby, affirmed.

[Endorsed:] 6313. McDonald, — in error, *v.* Commonwealth. Judgment. Copy.

38 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss*:

Supreme Judicial Court.

I, John Noble, clerk of said court, hereby certify that the foregoing are true copies of:

1. The petition for writ of error, including the assignment of errors, p. 1.
2. The writ of error, p. 11.
3. The writ of *scire facias ad aud. err*, p. 12.
4. The return of the writ of error, p. 4, together with the record from the superior court, p. 4.
5. The plea of the Com'th, p. 8.
6. The facts agreed by parties, p. 9.
7. The rescript of the sup. jud. ct. for the Commonwealth, p. 13.
8. The motion for judgment, p. 14.
9. The judgment of affirmation after rescript, p. 15, in the case—

JOHN A. MCDONALD, Plaintiff in Error,
v.
THE COMMONWEALTH, Defendant in Error,

determined in said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court this tenth day of October, A. D. 1899.

[SEAL.] JOHN NOBLE, *Clerk.*

[10-cent U. S. internal-revenue stamp, canceled Oct. 10, 1899. J. N.]

[Endorsed:] No. 6316. McDonald, — in error, *v.* Commonwealth. Certificate.

40 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *May* 19, 1899.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the case of John A. McDonald *vs.* Commonwealth, decided on the 18th day of May, 1899.

GEO. F. TUCKER,
Reporter of Decisions.

40½ MORTON, *J.:*

This is a writ of error.

The first assignment of error is based on a misapprehension of St. 1887, c. 435, and of the offence with which the plaintiff was charged and for which he was sentenced. The charge in the indictment was for forging and uttering certain checks in this State. The plaintiff in error was found guilty and sentenced for that, not for the crimes of which he had been previously convicted in New Hampshire and in this State. St. 1887, c. 435, does not authorize a trial here for offences committed in another State or the imposition of a penalty for crimes committed elsewhere. It imposes a heavier penalty in the case of a previous offender, and provides that the fact that he has offended before may be shown by convictions in this or another State, or both. There is nothing unconstitutional in these provisions. In fixing a penalty regard may be had to previous conduct without limiting it to the jurisdiction in which
41 the last offence was committed. Commonwealth *v.* Graves, 155 Mass., 163. The statute is not in violation of the fourteenth amendment to the Constitution of the United States (Sturtevant *v.* Commonwealth, 158 Mass., 598). It does not operate to deprive a person sentenced under it of the equal protection of the laws. It bears alike upon all persons within the Commonwealth and similarly situated who have committed felonies in this State since it took effect or who may commit felonies hereafter. Tindley *v.* Anderson, 171 U. S., 101, 106. Whether the punishment is cruel and unusual, and may therefore come within the prohibition which forbids a State from abridging "the privileges and immunities of citizens of the United States," or from depriving "any person of life, liberty, or property without due process of the law," will be considered later.

The second assignment is disposed of by what has already been said.

The third assignment rests on the contention that the allegations in regard to the previous convictions charge the crime of being an habitual criminal and constitute a count which is improperly joined to those which precede it. It was necessary to allege and prove the previous convictions. Tuttle *v.* Commonwealth, 2 Gray, 505; Commonwealth *v.* Cody, 165 Mass., 598. If proved as alleged, they aggravated the offence with which the plaintiff was charged,
42 and if he was convicted of that, required that he should be sentenced as provided by the statute. They did not constitute of themselves a crime, and the words of presentment, as if another count was begun with which the allegations preceded properly, could be rejected as surplusage. Sturtevant *v.* Commonwealth, *ubi supra;* Commonwealth *v.* Walker, 163 Mass., 226; Commonwealth *v.* Cody, *ubi supra.*

In regard to the fourth assignment, it is to be said that there is no constitutional provision in this State guaranteeing counsel to a prisoner and no statutory provision in respect to counsel except in the case of an indictment for murder. Pub. Sts., c. 150, § 19; Conant *v.* Burnham, 133 Mass., 503, 506. Article VI of the amendments to the Constitution of the United States does not apply to the States or to proceedings in S[illegible] courts. Commonwealth *v.* Whiting, 108 Mass., 5. The agreed fac[illegible]how that the rights of the plaintiff in error were carefully guarded and stated and explained to him at the trial.

The fifth assignment is to the effect that the punishment provided by the statute is a cruel and unusual punishment, and is contrary to article V of the amendments to the Constitution of the United States, and to article XXVI of our declaration of rights. It is probable that article VIII instead of article V of the amendments to the Constitution of the United States is intended, as the latter contains no reference to cruel and unusual punishments; but neither article V nor article VIII applies to the States. *In re* Kemm-
43 ler, 136 U. S., 436, 446; Commonwealth *v.* Hitchings, 5 Gray, 482; Commonwealth *v.* Whitney, *ubi supra.*

A similar provision in regard to cruel and unusual punishments is found, however, in article XXVI of the declaration of rights, except that the language there is that "no magistrate or court shall * * * inflict cruel or unusual punishments." As was said in Sturtevant *v.* Commonwealth, *ubi supra*, "This is directed to courts and not to the legislature." It is for the legislature to determine what acts shall be regarded as criminal and how they shall be punished. It would be going too far to say that their power is unlimited in these respects. Ordinarily the terms "cruel and unusual" imply something inhuman and barbarous in the nature of the punishment. *In re* Kemmler, *ubi supra.* But it is possible that imprisonment in the State prison for a long term of years might be so disproportionate to the offence as to constitute a cruel and unusual punishment. However that may be, it cannot be held, we think, that the punishment is "cruel and unusual" when the statute pro-

vides, as it does here, that one who has been convicted in this State of a felony committed here since it went into effect, and who twice before in this State or another State, or both, has been sentenced and committed to prison for terms of not less than three years each, shall be punished by imprisonment in the State prison for twenty-five years. The penalty was determined, no doubt, by the
44 view that in such a case the criminal habit has become so fixed and the hope of reformation is so slight that the safety of society requires and justifies a long-continued imprisonment of the offender. The statute provides, however, that if it appears to the governor and council at any time that the convict has reformed they may release him conditionally for the residue of the term. We think that the statute is not open to the objection of imposing a cruel and unusual punishment.

The sixth assignment is disposed of by what has been said in regard to the first assignment.

The seventh assignment rests on the contention that the statute is *ex post facto* in its character, and is disposed of not only by what has been said under the first assignment, but also by Sturtevant *v.* Commonwealth, *ubi supra*, where the same objection was taken and overruled.

The eighth assignment is, 1st, that under the statute in question the plaintiff in error has been tried here for an offence committed in New Hampshire and for which he was punished there; and, 2dly, that the proceedings at the trial by which the jury, after returning a verdict upon the counts in regard to forging and uttering, were sent out again to deliberate upon the habitual-criminal charge and afterwards returned a verdict upon that, were irregular, prejudicial, and unconstitutional. What has been previously said in regard to the nature of the offence with which the plaintiff in
45 error was charged disposes of the first ground taken in this assignment. As to the second ground, it appears that the judge charged the jury and they retired, and afterwards came into court to render their verdict. They were asked by the clerk as to the first, second, third, and fourth counts successively whether the prisoner was guilty or not guilty, and returned a verdict of guilty on each count. Thereupon the clerk was about to inquire of them in regard to the habitual-criminal charge when the judge rose and said that he had forgotten to charge upon that and proceeded to do so, and they retired again, and afterwards came into court and rendered a verdict of guilty on that part of the indictment. We see nothing prejudicial or unconstitutional in this. Pritchard *v.* Hennessy, 1 Gray, 295; Florence Sewing Machine Co. *v.* Baker Sewing Machine Co., 110 Mass., 70, 82.

It was within the power of the court to correct the error or omission in the way in which it did, and to send the jury out again, after it had rendered its verdict on the counts for forging and uttering, to deliberate on the habitual-criminal charge. Mason *v.* Mason, 122 Mass., 477; Brown *v.* Dean, 123 Mass., 254.

Under the ninth assignment, if it may be called such, no errors are alleged, and there is nothing for us to consider.

The result is that none of the errors assigned being supported, the entry must be—

Judgment affirmed.

[Endorsed :] McDonald *vs.* Commonwealth. Certified copy of the opinion of the supreme judicial court.

Endorsed on cover: File No., 17,548. Massachusetts superior court. Term No., 149. John A. McDonald, plaintiff in error, *vs.* The Commonwealth of Massachusetts. Filed October 24, 1899.